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Podoprigora R.A.

Foreign Experience in Dealing with the Problematic Issues of Administrative Procedures in Kazakhstan

Professor of Caspian University
(Almaty, Kazakhstan), Doctor of Law.

The article is dedicated to some problems of the administrative procedures in Kazakhstan (types of administrative acts; grounds for inaction; status of higher body decision; the access to materials of procedures; consequences of examination; contest an executed acts) and possibilities for the implementation of the foreign experience for its solving.

Keywords: *administrative law, administrative procedures, foreign experience.*

As far as back in 2015 administrative legal scholars of Kazakhstan remained in a stew in view of the adoption of the most important sources of administrative law: the Code of Administrative Procedures and the new edition of the Administrative Procedures Act. There also were disquieting apprehensions in connection with the adoption of other normative legal acts, which would complicate the creation of system basis for administrative-procedural law.

Unfortunately, expectations came short of expectations in the first (joyful) case, and met expectations in the second (alarm) one.

The Law on Legal Acts was adopted in Kazakhstan on April 6, 2016[44]. The law defines the system of the Republic of Kazakhstan legal acts, delimitates the legal status of normative legal acts and non-normative legal acts. Chapter 14 of the Law contains three articles (there are 67 articles in the Law) devoted to the legal acts of individual application. The articles contain general provisions on such acts; requirements for their registration; questions concerning entry into effect and loss of effect. It is clear that it is impossible to embody detailed procedural provisions in relation to the so-called administrative acts, as it is presented in the laws on administrative procedures that exist in other countries, just in three articles.

Entrepreneurial Code was passed in Kazakhstan on October 29, 2015[45]. The Code contains a certain number of provisions of a procedural nature, in particular with regard to authorizations and notifications, state control and supervision.

In addition, other recently passed normative legal acts, such as the Code of Civil Procedure from October 31, 2015, the Law of the Republic of Kazakhstan On Access to Information from November 16, 2015, the Law of the Republic of Kazakhstan On Self-regulation from November 12, 2015, partially touch upon the issues of administrative procedures.

On the contrary, the adoption of the new edition of the Administrative Procedures Act and the Administrative Procedure Code is postponed indefinitely. Whereas everybody talks about the importance of these laws, holds conferences and round tables. But informally, there is a resistance to its adoption and serious dissatisfaction of the state apparatus, in particular, in respect of the Administrative Procedures Act. And this is quite understandable: despite all the doubts about the effectiveness of good laws in the relevant political and legal environment and culture, a high-quality law on administrative procedures, in any case, might significantly change the format of relations between a citizen and the state apparatus.

Today the state apparatus is stuck. Despite a quite good and progressive legislation, issues about the effectiveness of public officials, the quality of their decisions, responsibility and corruption still remain.

[44] The Law of the Republic of Kazakhstan On Legal Acts from the 6th of October 2016. Kazahstanskaja Pravda, April 8, 2016.
[45] Entrepreneurial Code of the Republic of Kazakhstan from October 29, 2015. Gazette of the Parliament of the Republic of Kazakhstan, 2015, article 112.

There is an obvious lack of tried and tested ways of problems solution in the form of either new legislative acts, new state bodies or relatively new ones, such as e-government, e-public services, transfer of approaches adopted under corporate governance into public administration.

One of the solutions to the problems in public administration is seen as a bringing of foreign experience and resources: institutional, intellectual and financial.

If we slightly disregard administrative procedures we may detect that in recent years the Kazakh legal system has experienced a growing foreign influence, and in different forms.

So, in accordance with the Law of the Republic of Kazakhstan On Public Service[46] from November 23, 2015, state bodies, by the decision of an authorized commission, may hire foreign employees in accordance with the Labor Legislation of the Republic of Kazakhstan. At that, the foreign employees cannot occupy public posts and be public officials.

In accordance with the Constitutional Law of the Republic of Kazakhstan On the International Financial Centre Astana[47] from December 7, 2015, the established law of the Centre is based on the Constitution of the Republic of Kazakhstan, and consists of, among other sources, the Centre's acts that do not contradict the present Constitutional Law, which could be based on *the principles, norms and the case law of England and Wales and (or) the standards of the world's leading financial centers* and which are taken by the Centre bodies within the powers that are provided by the present Constitutional Law.

One may think about this foreign influence in different ways. Sometimes the borrowings from abroad deserve criticism because are brought without taking into account either the features of a country of origin or a recipient country.

But disuse of foreign experience is also wrong. And the Administrative Procedures Legislation is a very striking example of the need for such a use. Today, many solutions to the issues of the Kazakhstan managerial precedents can be found in a foreign legislation. It is significant that there is an experience of the former Soviet countries which are similar to us in the legal culture and traditions concerning the matters of legal regulation of administrative proce-

[46] Gazette of the Parliament of the Republic of Kazakhstan, 2015, article 153.
[47] Kazahstanskaja Pravda, December 9, 2015.

dures. And indeed, the very acts on administrative procedures are the invention of the continental system, but not the law of England and Wales.

The content of the modern acts on administrative procedures, in particular, adopted in the post-Soviet countries obviously shows significant use of provisions of the legislation of the countries that adopted the procedural laws in the last century (maybe it is not so noticeable in the case of the Republic of Belarus). There are a few of own inventions and mostly they relate to the technologization of administrative functions. That is why, principles of administrative procedures, types of administrative acts, the power of discretion and many other classic procedural issues are transmitted from existing acts or with a high degree of certainty might be transmitted in the case of preparation of such acts in the countries where they do not exist.

As part of this publication, I would like to draw your attention to some problematic issues that arise in the course of Kazakhstan's law enforcement practice and are accompanied by constant disputes, although the solution to the issues and help in resolving the disputes can be found in foreign legislation. All this once again proves the value of foreign borrowing in this case.

1. Kinds of administrative acts. Contemporary Kazakhstan legislation presumes that acts can only be written. In accordance with paragraph 19 of article 1 of the Law on Legal Acts, a legal act is an official document in written form that contains legal rules or individual legal instructions adopted at the national referendum or by authorized bodies. Normative legal acts and non-normative legal acts (among which we also include administrative acts) are in the same manner defined in the law as written official documents.

Besides, the Supreme Court of the Republic of Kazakhstan in one of its regulatory resolution defined that a demand of a public individual or a public official, which is not in a form of decision, in particular, in a form of an oral demand, should be considered as an action[48].

The foreign legislation specifically highlights various forms of acts (written, oral, tacit ones). Apart the acts, the laws on administrative procedures specifically describe actions and inactions. There is a similar situation with insignificant acts. There are special articles describ-

[48] Regulatory resolution of the Supreme Court of the Republic of Kazakhstan from December 24, 2010 On some Issues of Application by Courts the Norms of Chapter 27 of the Civil Procedure Code of the Republic of Kazakhstan || Newsletter of the Supreme Court of the Republic of Kazakhstan, no. 1, 2011.

ing an insignificant act and the consequences of its adoption[49]. In Kazakhstan, such acts still have been being referred and discussed only in textbooks.

2. Ground for an inaction.

Very often, in the Kazakhstan practice, the ground for inaction, bureaucracy, unwillingness of a public body or official to make a decision is a reference to the fact that the issue is unsettled by law or other normative legal act, lack of the mechanism for application, unpublished by-law, etc. Despite the existing legal possibilities, natural or legal persons may not get permission, license or resolve other issues for years because of such reference.

The foreign legislation contains the rules which state that the lack of proper regulation by law, the lack of a mechanism and other similar circumstances are not the grounds for non-application of law norms.

So, for example, paragraph 10 of article 15 of the Administrative Procedure Law of Latvia from October 25, 2001 stipulates that an institution and court do not have the right to refuse settlement of an issue on the basis that this issue is not regulated by law or another external regulatory enactment. They do not have the right to waive application of a law norm on the grounds that the law norm does not provide for an application mechanism, is imperfect or that other regulations which regulate the law norm in more accurate way have not been issued. This does not apply only to the case when an institution that has to apply the law norm or in any other way participate in its application is not created and does not operate[50]. The Latvian law calls this approach "Prohibition of legal obstruction of institutions and courts".

3. The status of decisions of higher bodies concerning a complaint against an administrative act.

There is no single opinion, what is the status of the decision on a complaint against an administrative act, especially if the complaint is not met, in the Kazakhstan judicial practice. Relatively recently, it has become clear that both an initial decision and the decision of a higher body can be challenged in the court: in accordance with paragraph 15 of the above-mentioned regulatory resolution of the Supreme Court, at the applicant's disagreement with the decision of

[49] Articles 62 and 63 of the Law of the Republic of Armenia On the Principles of Administration and Administrative Court Proceedings from February 18, 2004 || Collection of Legislation on Administrative Procedures. – Almaty, Representation of the German Society for International Cooperation (GIZ) in Kazakhstan, 2013, p. 107.

[50] Collection of Legislation on Administrative Procedures – Almaty, Representation of the German Society for International Cooperation (GIZ) in Kazakhstan, 2013, p. 257.

a higher state body, local self-government body or a higher office holder either the decision of the higher state body, the local self-government body, the higher office holder or the decision of a lower state body, local self-government body, actions (inaction) of the office holder or public official shall be subject to appeal to court.

However, in practice, there are frequent situations where state bodies or courts do not consider the decision of a higher body as an independent act.

Foreign laws on administrative procedures indicate quite clearly that a higher body's decision is also an administrative act. So, in accordance with article 202 of the General Administrative Code of Georgia from June 25, 1999, a decision on considering of a complaint taken by an administrative body is an individual administrative-legal act and shall meet the requirements to individual legal act that are established by the Code[51].

4. The right to acquaintance with an administrative procedure process

In the present conditions, when the taking of acts is being typified and technologized, the issue gets particular relevance. An addressee of an administrative act rarely has an opportunity to check the status of the issue or affect the decision by providing additional documents or explanations. After a set period of time, he receives a positive or negative response.

In our opinion, foreign acts contain very important articles or even sections on the rights of a participant of administrative proceedings to familiarize with the case materials.

Moreover, the legislations of other states contain provisions on that prior to the issuance of an administrative act the applicant must be heard. For example, in accordance with paragraph 1 of article 40 of the Law of the Republic of Estonia from June 26, 2011 On Administrative Procedures of the Republic of Estonia, prior to the issuance of an administrative act the administrative body shall provide the process's participant the possibility of submission opinions and objections on the case in written, oral or other convenient form[52].

Paragraph 1 of article 8 of the Law of the Republic of Finland from June 10, 2003 On Administrative Procedures provides that an administrative authority, within its competence,

[51] Collection of Legislation on Administrative Procedures – Almaty, Representation of the German Society for International Cooperation (GIZ) in Kazakhstan, 2013, p. 248.
[52] Collection of Legislation on Administrative Procedures – Almaty, Representation of the German Society for International Cooperation (GIZ) in Kazakhstan, 2013, p. 430.

shall provide to the interested party necessary advice in relation to decisions of administrative cases, as well as answer questions and queries regarding services[53].

5. Status and consequences of an examination.

There is a problem in Kazakhstan's practice. It is when the decisions of a state body are based on examination results. If the examination is negative, the state body states that it cannot do anything. In its turn it is impossible to appeal expert opinions because their status is not defined, as well as the status of experts or expert institutions.

For example, in accordance with paragraph 1 of the Law of the Republic of Kazakhstan from October 11, 2011 On Religious Activity and Religious Associations[54], the denial of state registration of a religious association is made in cases when the association, that is being founded, is not recognized as a religious association on the basis of religious examination results. When challenging the acts of refusal, the justice agency states that at the negative result of religious expertise it has no choice and is bound to the result of this examination. Then it offers to appeal the results. Moreover, in accordance with the appropriate Standard of public services, in cases of disagreement with the results of provided public service, the service taker has the right to go to court[55]. The courts also refuse to hear cases on challenging the results of religious examination upon the pretext that disputes connected to expert opinions are not public-legal and they do not have the right to evaluate an expert opinion for the legality or unlawfulness.

Foreign legislation has made an approach which consists in the fact that examination results are not binding for an administrative authority in an administrative and procedural proceedings. For example, article 25 of the General Administrative Code of Georgia states that except as expressly recognized herein, the conclusion of a public expert is not mandatory for an administrative body. Failure to take into account the conclusion must be justified[56]. The administrative body shall assess the expert opinion along with the other evidences collected in the

[53] Collection of Legislation on Administrative Procedures – Almaty, Representation of the German Society for International Cooperation (GIZ) in Kazakhstan, 2013, p. 367.
[54] Gazette of the Parliament of the Republic of Kazakhstan, 2011, no. 17, article 135.
[55] Standard of the state service "Carrying Out of a Religious Expertise", approved by the Order from the Minister of Culture and Sport from April 23, 2014. ||Informational-legal system of normative legal acts of the Republic of Kazakhstan "Ədilet".
[56] Collection of Legislation on Administrative Procedures – Almaty, Representation of the German Society for International Cooperation (GIZ) in Kazakhstan, 2013, p. 204.

course of proceedings and eventually the act, in connection with the publication of which there was the examination, is contested.

6. Contestation of executive acts.

In Kazakhstan there is a contradictory situation with respect to contesting performed acts. In practice, performed acts are contested in courts. However, according to paragraph 11 of Regulatory Resolution of the Supreme Court from December 24, 2010 On some Issues of Application by Courts the Norms of Chapter 27 of the Civil Procedure Code of the Republic of Kazakhstan", a decision of a state body, local self-government body in the form of an individual legal act can be appealed, if such an act does not cease to have effect due to the execution of instructions (claims) contained in it.

In the situations where this issue is touched, foreign laws say that an administrative act may be also contested in the case if it has already been performed or otherwise lost its effect. So, in accordance with paragraph 1 article 82 of the Administrative Procedural Law of Latvia from October 25, 2001, an administrative act that has been performed or lost its effect may be contested in the following cases:

- Decision on the legitimacy of an administrative act is needed for protection of a person's rights;
- for demand of compensation;
- for prevention of the recurrence of similar cases[57].

In addition to the problems in the field of administrative procedures, of course, there are many other. And it is hard to find the solutions in the foreign legislation. For example, when it comes to administrative acts issued by the so-called advisory bodies in circumvention of the current state bodies or by quasi-public agencies (unless you use a broad approach, as, for example, in the Act of the Federal Republic of Germany from May 25, 1976 On Administrative Procedures of the Federal Republic of Germany, where an administrative authority is seen as any institution carrying out public administration tasks[58] or in the General Administrative Code of

[57] Collection of Legislation on Administrative Procedures – Almaty, Representation of the German Society for International Cooperation (GIZ) in Kazakhstan, 2013, pp. 276-277.
[58] Ibid. p. 152.

Georgia, where an administrative authority means any person who, under the legislation, performs public functions[59]).

The laws on administrative procedures contain a lot of other provisions that are interesting and unusual for our legal reality. For example, all the laws have a requirement to substantiate an administrative act. But the Latvian law also states that *in the justification of an administrative act an institution may use the arguments given in judicial decisions and legal literature as well as in other specific literature*. The value of works of legal scholars in this approach increases[60].

Of course, certain provisions of the Acts on Administrative Procedures, despite all their progressiveness, make you think about the way they will work in our legal environment.

For example, paragraph 13-2 of article 13 of the Law of Azerbaijan Republic from October 21, 2005 On Administrative Proceedings indicates that an administrative authority must act in accordance with the established administrative practice[61]. In our view, it is a very controversial provision, given that such practice may not always be based on the law.

Summing up, we can say that, probably, there is a positive thing that Kazakhstan and Russia have not adopted still the Laws on administrative procedures. There is an opportunity to look at the experience of other countries, including those close to us in spirit, mentality, legal traditions and culture. The main thing is that we should not drag out this contemplation.

[59] Ibid. p. 198.
[60] Ibid. p. 272.
[61] Ibid. p. 55.